IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 1890 OF 2007
(Marotrao Daulatrao Chandurkar .v. Shobha Purushottam Bhute)

Office Notes, Office Memoranda of Coram appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders

Shri S.D. Deshpande, Advocate for the petitioner.
Shri A.S. Kilor, Advocate for the respondent.

CORAM : R.V. MORE, J.
14TH DECEMBER, 2007

Heard the learned Counsel appearing on behalf of the respective parties.

The petitioner, by filing the instant petition under Article 226 and 227 of the Constitution of India, takes exception to the order dated 20.04.2007 passed by the learned Joint Civil Judge, Senior Division, Nagpur, below Exh.31 in Special Darkhast No.116/2006. By this order, the petitioner's (Judgment Debtor) application to recall registered sale deed executed in favour of decree holder i.e. respondent and to recall the warrant of possession of the suit house, came to be rejected.

The respondent is the original plaintiff and the petitioner is the original defendant in Civil Suit No. 58/1980. This suit came to be decreed on 30th September, 1983 by the learned Civil Judge, Senior Division at Nagpur. There is no dispute that in a suit for specific performance of contract, the relief of possession was also

claimed by the respondent. The learned Joint Civil Judge, Senior Division, decreed the respondent's suit for specific performance of contract. The respondent was directed to deposit balance of consideration in the Court within one month from the date of judgment and on depositing the amount, the petitioner was directed to execute the sale deed in favour of the respondent within seven days thereafter and failing which the sale deed was to be executed by the Court at the costs of respondent.

This decree passed by the trial Court came to be challenged by the petitioner by filing First Appeal before the High Court, which was dismissed in the year 1994 and thereafter the petitioner filed LPA in the year 1994 itself, however same was also dismissed on 30.11.2005. The petitioner made a statement that during the pendency of LPA, the trial Court's decree was stayed by this Court on 23.09.1994 and stay was in operation till 30.11.2005.

After dismissal of the LPA filed by the petitioner, the respondent filed execution petition in the year 2006. There is no dispute that the sale deed of the suit property got registered in favour of the respondent on 08.11.2006 through the Court and thereafter warrant of possession was also issued in favour of the respondent under Order XXI Rule 35.

The petitioner thereafter filed an application below Exh.31 before the executing Court for recalling registered sale deed and warrant of possession, which application came to be rejected by the impugned.

Shri S.D. Deshpande, the learned Counsel for the petitioner raised four objections for execution of the decree and claimed that the registered sale deed and warrant of possession are required to be recalled. Shri Deshpande, the learned Counsel for the petitioner firstly submitted that the payment of balance of consideration in pursuant of the judgment and decree dated 30th September, 1983 is not made by the respondent within stipulated time. Secondly, he submits that the possession though asked by the respondent in a suit was not granted and, therefore, now warrant of possession cannot be issued. Thirdly the copy of the draft sale deed was not supplied to him. The same is in breach of mandatory provisions of Order XXI Rule 34 and fourthly execution is not filed within a period of limitation.

Shri A.S. Kilor, the learned Counsel for the respondent while refuting all the objections pointed out that the payment of balance of consideration was made within the stipulated period. He further pointed out that though the decree is silent about possession, the executing Court can grant possession in execution proceedings also. In so far as the objection that the draft sale deed not served on the petitioner is concerned, he submitted that the petitioner was present throughout executing proceedings and, therefore, non service of draft sale deed did not cause serious any prejudice. This objection is of hyper technical nature. In so far as the last objection about limitation is concerned, Shri Kilor, the learned Counsel submitted that this objection is taken for the first

time before this Court and in any case, the execution is within limitation.

Shri A.S. Kilor, the learned Counsel for the respondent relied upon the judgment of the Apex Court in the case of Babu Lal .v. M/s. Hazari Lal Kishori Lal and others (reported in AIR 1982 SC 818) and the judgment of Calcutta High Court in the case of Debabrate Tarafder .v. Biraj Mohan Bardhan (reported in AIR 1983 Calcutta 51).

Having heard the learned Counsel appearing on behalf of the respective parties and having gone through the writ petition along with ratio of the judgments relied upon by the learned Counsel for the respondent, I am of the considered view that there is no merit in the petition.

The first objection of Shri Deshpande, the learned Counsel for the petitioner that within stipulated period, the respondent/plaintiff has not deposited balance amount of consideration is devoid of any substance. The decree was passed on 30th September, 1983 and the balance of consideration was to be deposited within a period of one month from the date of decree. The receipt which is annexed at page 30 of the petition, which is relied upon by Shri A.S. Kilor, shows that the balance amount of consideration had been deposited in the Court on 28th October, 1983 and, therefore, the first objection of Shri Deshpande does not survive.

In so far as the second objection namely possession was

not given to the respondent and, therefore, now possession cannot be asked for in execution is concerned, I find no merit. The Apex Court in the case of Babu Lal .v. M/s. Hazari Lal Kishori Lal and others (cited supra)considered the provisions of Section 22 of the Specific Relief Act, and held that the only purpose of newly enacted provision i.e. Section 22 is to avoid the multiplicity of the proceedings and that the plaintiff may get appropriate relief without being hampered by procedural complications. The Apex Court further held that even if the possession is not claimed in a suit for specific performance of contract and decree only for the specific performance is passed, in that case the relief of possession can be claimed during execution proceedings. In so far as the present case is concerned, the respondent has claimed relief of possession and, therefore, he was not required to apply again though he is entitled to in accordance with aforesaid judgment. In view of the ratio of the above judgment, I am of the considered view that the trial Court has not committed any error by issuing warrant of possession in favour of the respondent.

I find substance in the submission of Shri A.S. Kilor, the learned Counsel for the respondent that possession to have been granted, in view of the clause in agreement about delivery of possession. The Calcutta High Court was dealing with similar case like present one. The Division Bench of the Calcutta High Court in Debabrate Tarafder .v. Biraj Mohan Bardhan (cited supra) held that when delivery of possession is provided for by an agreement

between the parties, in that case the relief of possession deemed to have been granted, even though the decree is silent in that regard. Shri A.S. Kilor, the learned Counsel invited my attention towards clause of possession in agreement between the parties and, therefore, in my view, the ratio of the decision of Calcutta High Court is squarely applicable. In these facts and circumstances, the second objection raised by Shri S.D. Deshpande, the learned Counsel for the petitioner is without any substance.

In so far as the third objection regarding copy of the draft sale deed is not served on petitioner is concerned, the learned Judge, in paras 6 and 7 of the impugned order, observed that the petitioner has already appeared in the proceedings and, therefore, there was no need to send the copy of the draft sale deed to him for the purpose of inviting his objection. The purpose of provisions of Order XXI Rule 34 is to verify whether the sale deed is beyond the scope of relief. It is not the case of the petitioner that the sale deed as executed, is beyond the scope of decree and, therefore, in my opinion, the objection is rather hyper technical and in any case non service of draft sale deed does not cause any prejudice to the petitioner. This objection is thus without any substance.

The last objection raised by Shri Deshpande regarding limitation is also without any substance. Firstly this objection was not taken before executing Court and on merit it has to be rejected. The decree of specific performance dated 30th September, 1983 was put in execution in March, 2006. It is not disputed that between the

period 23rd September, 1994 and 30th November, 2005, this decree was stayed. If this period of stay is excluded, then, in my opinion, the execution petition is filed within limitation of 12 years. In the facts and circumstances mentioned above, the petition is devoid of merit and the same is dismissed, accordingly with no order as to costs.

At his stage, Shri S.D. Deshpande, the learned Counsel for the petitioner seeks continuance of the stay granted by this Court vide order dated 24.04.2007 for the period of eight weeks.

Shri A.S. Kilor, the learned Counsel for the respondent, opposes the same.

Since the stay was granted in the month of April, 2007, which was in operation till today, the same is continued for further period of four weeks from today.

JUDGE

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